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In The

# Supreme Court of the United States

October Term, 1997

TIMOTHY D. SALTSMAN, *et al.*,

*Petitioners,*

*vs.*

DAWN CAMPBELL, *et al.*,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS HENNING, DeWITT, ST. JOHNS POLICE DEPARTMENT AND MADDEN

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24 pp

## COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

### I.

Do the totality of circumstances demonstrate valid consent where an adult woman educated in her rights under the Fourth Amendment repeatedly asserts them in response to a statement that a social worker and two police officers will get in one way or another, closes the door and consults by telephone with her attorney, but then opens the door and invites them in to complete an investigation regarding the condition of the home and care of the minor children?

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## OPINIONS BELOW

The opinion of the United States District Court for the Western District of Michigan in *Saltsman v. Campbell*, File No 5:96-CV-63, was entered on July 11, 1997 and is reproduced at Appendix 13a to the petition for certiorari. It is unpublished.

The decision of the Sixth Circuit Court of Appeals in *Saltsman v. Campbell,* Case No. 97-1857 was filed on May 12, 1998. It is unpublished but can be found at 145 F.3d 1333, 1998 WL 252758 (6th Cir. (Mich.)). It is reproduced at Appendix la of to the petition for certiorari.

## CONCISE STATEMENT OF THE CASE

### A. The procedural history.

The Saltsmans complain that a child protective services worker and two police officers allegedly entered their residence in violation of the Fourth Amendment while investigating a complaint of child neglect and unsanitary conditions in the home (R. 1: Complaint, ¶¶ 11-28, 04/15/96, Apx. at pp. 13-16).

Defendants Larry Henning, Scott DeWitt, Michael Madden, and the St. Johns Police Department sought summary judgment (R. 51: Motion by Defendants, 03/03/97, Apx. at p. 169).[1] Defendant Dawn Campbell sought dismissal and summary judgment (R. 52: Motion by Defendant Campbell, 03/03/97, Apx. at p. 272).

The district court granted summary judgment in favor of Campbell, Henning, and DeWitt (R. 64: Opinion, pp. 12-13,

1. Michael Madden and the St. Johns Police Department were sued for allegedly creating an unconstitutional policy, an issue abandoned in the petition filed with this Court.

Apx. at p. 603-615). This ruling was based on the district court's conclusion that plaintiffs failed to show a violation of a constitutionally protected right because the totality of circumstances failed to establish that Mrs. Saltsman's consent was coerced (R. 64: Opinion, p 12, 07/14/97, Apx. at p. 614).

The district court found that Tina Saltsman was "educated in the area of Fourth Amendment law" and that she "understood her constitutional right to refuse entry" (R. 64: Opinion, p. 10, Apx. at p. 612). The district court evaluated Mrs. Saltsman's testimony that she consented because an officer threatened to take her children if she did not (R. 64: Opinion, p. 9, Apx. at p. 611). The district court also considered Mrs. Saltsman's claim that one officer told her he did not need a warrant because he was with the protective services worker and that the other officer told her that they would "get in one way or another" (R. 64: Opinion, p. 9, Apx. at p. 611). The district court rejected the contention that Mrs. Saltsman was coerced because even after the statements were made she continued to refuse entry (R. 64: Opinion, pp. 10-11, Apx. at p. 612-613). Mrs. Saltsman did not "cave under the threat of losing her children" (R. 64: Opinion, p. 11, Apx. at p. 613).

The district court took note of Mrs. Saltsman's testimony that "neither the officers nor Campbell ever spoke to her in a loud or disrespectful manner, tried to get into her home, or even demanded entry" (R. 64: Opinion, p. 12, Apx. at p. 614). Her consent was not "contemporaneous with the alleged coercive statements" (R. 64: Opinion, p. 11, Apx. at p. 613). It took place after she "closed the door and privately consulted with her attorney . . ." (R. 64: Opinion, p. 11, Apx. at p. 613). Accordingly, the district court held that plaintiffs failed to show the violation of a constitutionally protected right (R. 64: Opinion, p. 12, Apx. at p. 614). Judgment was entered in accord with the district court's opinion and order (R. 65: Judgment, 07/14/97, Apx. at p. 624).

The Sixth Circuit Court of Appeals affirmed the district court judgment (Opinion, 05/12/98, Apx. Petition, pp. 1a-10a). In a narrow, fact-based ruling, the Sixth Circuit Court of Appeals found no violation of the Saltmans' Fourth Amendment rights. The Sixth Circuit set forth the facts as follows:

> Plaintiffs Timothy and Tina Saltsman are the parents of five children. The Saltsmans reside in St. Johns, Michigan. Defendant Dawn Campbell is a child protective services worker and is employed by the Clinton County Family Independence Agency ("FIA"). Defendants Larry Henning and Scott Dewitt are police officers employed by the St. Johns Police Department. Defendant Michael Madden is the Chief of Police for the St. Johns Police Department.
>
> On March 21, 1996, the FIA received a complaint about the Saltsmans' home by a person claiming to be a grandparent of the Saltsmans' children. The anonymous person alleged that Tina Saltsman pulled her child out of school and was not educating the child at home. The complainant further alleged that the Saltsmans' home is in deplorable condition, is cluttered with food and junk, and smells of dirty clothes.
>
> On March 22, 1996, Tina Saltsman was in her home with three of her children, Ashley, then seven years old, Timothy, then five years old, and Alene, then three weeks old. At approximately 4:00 p.m., Campbell visited the Saltsmans' home to investigate the complaint received the day before. Campbell knocked on the front door and Tina Saltsman answered. Campbell identified herself and explained

that she was from the FIA and needed to talk to Saltsman about a complaint the FIA had received. Tina Saltsman responded by walking outside the home and closing the front door behind her. She told Campbell that she could not enter the home.

Campbell left the Saltsmans' residence and returned to her office. After consulting with her supervisor, Campbell contacted the central dispatch of the St. Johns Police Department and requested assistance with her investigation of the Saltsmans' home.

As soon as Campbell left her property, Saltsman called the Home School Legal Defense Association ("the Association"), located in Purcellville, Virginia. Saltsman had been a member of the Association for several years. As a dues paying member, Saltsman could call an Association attorney in Virginia to receive legal advice. On the day in question, the receptionist for the Association forwarded Saltsman's call to David Gordon, an Association attorney. Saltsman told Gordon that a child protective services worker came to her home and when entry was refused, said she would return with the police.

A few minutes later, at approximately 4:30 p.m., officers Henning and Dewitt met Campbell at the Saltsmans' residence. One of the three knocked on the Saltsmans' front door and requested entry. Through the closed door, Tina Saltsman told them that they could not come in. Saltsman then left the home through the back door and walked around to the front of the housing carrying a portable telephone. Gordon was still on the line. Saltsman

asked the officers if they had a warrant and was told that they did not. Campbell told Saltsman that she needed to come in to make sure the children were safe. Saltsman refused to allow them to enter her home.

At some point Gordon asked Saltsman to hand the telephone to one of the officers. Gordon informed the officer that the Fourth Amendment prohibited his entry into the Saltsmans' home without a warrant or exigent circumstances. The officer allegedly said "we don't need a warrant because we're with her," referring to Campbell.

Eventually, Gordon suggested that Saltsman bring the children to a door so that the officers and Campbell could see that the children were not in danger. Saltsman told Campbell to go to the rear of the house and she would bring the children to the back door for observation. Saltsman brought Ashley and Timothy to the back door. After viewing the children, Campbell stated that she still needed to enter to make sure the home was safe. Saltsman did not respond as she was conferring with Gordon on the telephone.

Saltsman testified that one of the officers then spoke to Gordon again. After the officer handed the telephone back to Saltsman, she alleges that the officer said that they "would get in one way or the other," and if she did not let them in, they would take her children. Saltsman then shut the back door and spoke with Gordon. The officers and Campbell walked around to the front of the house, and Campbell and Dewitt began to walk toward Campbell's car.

> Henning knocked on the front door of the home and Saltsman came out, threw her hands up, and let Henning into the home. Henning informed Campbell and Dewitt that Saltsman was going to let them in. Campbell and Dewitt walked back toward the house and entered the front door.
>
> Campbell and Saltsman walked through the house while the officers waited inside the front door. Campbell did not find the house in deplorable condition as was reported. On April 30, 1996, Campbell officially closed her investigation of the Saltsmans, finding insufficient evidence to substantiate the complaint. (Opinion, Apx. of Petition, pp. 14a-16a).

The Sixth Circuit applied this Court's test for a valid consent to these facts, asking if consent was "freely and voluntarily given within the totality of the circumstances" (Opinion, Apx. to Petition, p. 5a). Among the factors, the court considered were

> . . . the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of the detention; and the use of coercive or punishing conduct by the police.

(Opinion, Apx. of Petition, p. 5a quoting *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir.), *cert. denied*, 117 S. Ct. 136, 136 L. Ed. 2d 84, 65 USLW 3259 (1996)). The Sixth Circuit concluded that Mrs. Saltsman's consent was valid and affirmed the district court's ruling that she freely gave her consent as a matter of law (Opinion, Apx. of Petition, pp. 6a-7a). The Sixth Circuit also held that the individual defendants

are entitled to qualified immunity (Opinion, Apx. of Petition, pp. 7a-8a).

The Saltsmans now seek a writ of certiorari from this Court on the question of the voluntariness of consent.

**B. The totality of circumstances relating to Tina Saltsman's consent.**

On March 22, 1996, Dawn Campbell of the Clinton County Social Services visited the Saltsmans' home to investigate a complaint of child neglect and poor living conditions (R. 49: Statement of Undisputed Facts, Campbell Dep., pp. 24-25, Apx. at p. 91-92). When she arrived, Campbell told Tina Saltsman the purpose of her visit. (R. 49: Statement of Undisputed Facts, Campbell dep., p. 27, Apx. at p. 93). Tina Saltsman came out of the house and shut the front door behind her to talk to Campbell, but refused to let her into the house (R. 49: Statement of Undisputed Facts, Campbell dep, pp. 25, 27-28, Apx. at p. 93). Campbell's concern for the children was heightened by her observation of dirty diapers on the front porch and by Saltsman's actions and demeanor (R. 49: Statement of Undisputed Facts, Campbell dep. p. 24, 25, 27, 28, Apx. at pp. 93-95). In the house with Tina Saltsman were her three children Ashley, Timothy, and Alene, and two other children for whom Saltsman was caring (R. 49: Statement of Undisputed Facts, Saltsman dep., pp. 24-25, Apx. at p. 93).

When she was unable to gain admittance, Campbell left, contacted her supervisor, and then called the police department for assistance with a child welfare check (R. 49: Statement of Undisputed Fact, Campbell dep., pp. 28-29, Apx. at pp. 94-95). Before Campbell returned, Tina Saltsman had locked the doors, closed the blinds, and called her attorney, David Gordon.

The telephone call, which lasted 30 minutes, continued throughout the events (R. 51: Motion by Defendants, Gordon dep., pp. 5-14, Apx. at pp. 252-258).

David Gordon is an attorney licensed in Tennessee, Virginia and the District of Columbia (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., pp. 3-4, Apx. at pp. 250-251). An attorney-client relationship exists between Gordon's employer, the Home School Legal Defense Association, for which he is a staff attorney, and Ms. Saltsman (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., p. 4, Apx. at p. 251). Saltsman called Gordon for legal advice regarding the events transpiring at her home. (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., p. 5, Apx. at p. 252). She was on the telephone with Gordon when Campbell returned (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 49, 67, Apx. at pp. 212, 217).

Officers Henning and DeWitt met Campbell at the Saltsman residence. Campbell told them that the nature of the complaint was the condition of the home (R. 49: Statement of Undisputed Facts, Campbell Dep., p. 35, Apx. at p. 97). When Campbell and the officers asked to enter the house, Tina Saltsman came out, closed the door behind her, and again refused access (R. 49: Statement of Undisputed Facts, Campbell dep. p. 28-30, Apx. at pp. 94-96). Henning, DeWitt, and Campbell tried to persuade Saltsman to consent to entry (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225).

On the advice of her attorney, Saltsman brought one of the children to the back door so that Campbell could see her (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 49-53, 67, Apx. at pp. 212-216). The oldest Saltsman child appeared at the back door in a coat with the hood up (R. 51: Motion by

Defendants, Exhibit 4, DeWitt Dep., p. 7, Apx. at p. 238). Tina Saltsman told her daughter to say "she was okay, and her daughter did" (R. 52: Motion by Campbell, Exhibit 21, DeWitt dep., p. 7, Apx. at p. 350). Campbell again said she needed to inspect the home (R. 49: Statement of Undisputed Facts, Campbell dep. p. 46, Apx. at p. 100).

At this point, Campbell and the officers left the porch. But they continued to converse with Tina Saltsman, who continued talking with them and with her attorney over a portable telephone (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 51, Apx. at p. 214).

Tina Saltsman admitted that no physical threats were used and no physical movements of any kind took place that she perceived as physically threatening (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 72-73, Apx. at pp. 218-219). No one shouted. Saltsman was calm, neither yelling nor crying (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., pp. 52-55, Apx. at pp. 545-548). Henning recalls saying that he did not have a warrant but one was not needed (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 16-17, Apx. at pp. 228-229). Henning did not have enough information from the protective service worker to know whether there was an emergency situation inside the house. He did not recall making other statements as alleged by plaintiffs (R. 51: Motion by Defendants, Exhibit 3, Henning dep. p. 15-17, 25-28, Apx. at pp. 227-229, 231-234).

Mrs. Saltsman claims that she was frightened by a threat that Campbell and the officers would get in one way or the other and that her children would be taken (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 76, Apx. at p. 220). She understood the statement that they would get in one way or another to mean that if they didn't get in, they would have to

get a court order (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., p. 76, Apx. at p. 555).

Saltsman, nevertheless, closed the door to the back porch and went inside to talk with her attorney on the telephone (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., p. 72, Apx. at p. 552). Gordon admitted that he told Saltsman to let Campbell and the officers in (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., pp. 14 Apx. at p. 258). He did so because of his fear that there was a risk that the children would be taken (R. 51: Motion by Defendants, Exhibit 5, Gordon dep. p. 3-5, 11, 13-14, Apx. at pp. 250-252, 256, 257-258).

As DeWitt and Campbell walked away from the house in the direction of Campbell's car, Henning went to the front door and knocked again (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225). Before Henning could say anything, Saltsman invited him in (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225). While Campbell examined conditions in the house (Campbell dep. p. 52-53, 55, 58) Henning and DeWitt stood near the front door (R. 51: Motion by Defendants, Exhibit 3, Henning dep. p. 5-8, Apx. at pp. 223-226). After a short time, all three left.

## REASONS FOR DENYING THE WRIT

## CERTIORARI SHOULD BE DENIED WHERE THE SIXTH CIRCUIT CORRECTLY APPLIED THIS COURT'S FACT-BASED TEST AND EVALUATED THE TOTALITY OF CIRCUMSTANCES TO DECIDE CONSENT WAS VALID AND WHERE DIFFERING RESULTS IN THE CIRCUITS IS NOT DUE TO A CONFLICT BUT TO DIFFERENCES IN THE FACTS OF THE CASES.

### A. This Court's totality of circumstances test best allows lower courts to decide consent in light of the multiplicity of factors that may be present in encounters between police and citizens.

This Court typically denies certiorari when review of a lower court decision is sought, that turns mainly on an analysis of the particular facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *see also Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L. Ed. 2d 714 (1984) (Stephens J.). And properly so. Given the volume of lower court decisions and the demands on this Court's time, review is granted where the law needs development and not where a litigant seeks additional review of a fact-based analysis with which he or she disagrees.

Despite this long standing policy, petitioners here urge the Court to grant a writ of certiorari because of their disagreement with the Sixth Circuit's application of this Court's totality of the circumstances test to the facts of this case. Perhaps realizing the difficulty in persuading this Court to grant a writ to correct claimed error, petitioners argue that the Sixth Circuit decision: (a) "creates substantial danger for the police and public; (b)

represents a forbidden bright-line test for Fourth Amendment analysis; and (c) it creates a split in the circuits." (Petition for a Writ of Certiorari, p. 9). In essence, petitioners contend that the Sixth Circuit has held that an attorney's advice to consent to a search outweighs any other factors and renders consent per se valid. Petitioners urge review to correct this claimed error. Petitioners argue that this Court should instead hold that when an attorney gives advice in response to a threat, it "must never be counted as a factor which cleanses the threat of coercion." (Petitioner for a Writ of Certiorari, p. 16). These issues do not warrant review because no further development of this Court's well-settled test is needed and, in any event, the issues are not squarely presented on this record.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." But the Fourth Amendment prohibition against unreasonable searches and seizures has no application to consensual encounters between police officers and citizens. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991). This Court has repeatedly held that it is only by consideration of the totality of the circumstances that the voluntariness of a citizen's cooperation can be determined. *State v. Robinette,* 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 64 L. Ed. 2d 497(1980).

This Court has been confronted with numerous opportunities to substitute a per se rule for the totality of the circumstances test. But this Court has rejected them because the current test is particularly suited to weighing the multiplicity of facts peculiar to any police-citizen encounter. *Michigan v. Chestnut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988); *Florida v. Reyer*, 460 U.S. 491, 506, 103 S. Ct. 1319

75 L. Ed. 2d 229 (1983). The test is predicated upon this Court's view that the

> purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"

*United States v. Mendenhall*, 446 U.S. 544, 553-554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) *quoting United States v. Martinez - Fuerte*, 428 U.S. 543, 554 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116 (1976). Notions of voluntariness reflect an accommodation of the complex values implicated in citizen encounters with police. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). This Court has maintained its totality of circumstances test to decide the validity of consent because it allows the courts to deal with these values as they arise in the myriad distinct encounters between citizens and police.

**B. The Sixth Circuit explicitly refused to adopt a per se rule governing consent given on the advice of counsel.**

The Sixth Circuit correctly applied the totality of circumstances test to conclude that Tina Saltsman freely and voluntarily consented to the search of her home. No further review is necessary. In an effort to conjure up some novel point of law, petitioners try to characterize the Sixth Circuit's ruling as one embracing a new bright-line rule. Petitioners concede that the Sixth Circuit Court of Appeals did not "declare an explicit 'per se' rule that an attorney's advice always purges police coercion . . ." (Petition for a Writ of Certiorari, p. 10). But petitioners assert that the pragmatic effect of the Sixth Circuit's decision is to create a bright line test (Petitioner for a Writ of Certiorari, p. 10).

Petitioners' argument is a classic example of circular reasoning or petitio principii. See generally, Thomas Walter Swan, "Hand," 57 Yale L.J. 107, 170 (1947). The question petitioners seek to answer is whether the Sixth Circuit has violated this Court's totality of the circumstances test by declaring an explicit per se rule, rather than weighing the totality of the facts. But petitioners assume that the Sixth Circuit has done so without establishing this by pointing to any statement in the opinion, which would prove the assumption. *See* Ruggero J. Aldisert, Logic for Lawyers, p. 11-30 (1992).

And statements in the opinion explicitly announce that no bright-line rule has been adopted. Petitioners assert that the Sixth Circuit embraced a "de facto 'bright-line' rule immunizing all entries as consensual whenever an attorney has given advice to permit the search" (Petition for a Writ of Certiorari, p. 10). This assertion is inconsistent with the Sixth Circuit's careful fact-based analysis of a whole series of factors. The court explicitly announced that "the fact that Mrs. Saltsman was conferring with her attorney is not dispositive . . ." (Opinion, 69 n. 1). This Court need not grant a writ of certiorari to correct the claimed error because it did not occur. Petitioners urge this Court to take the case to announce that an attorney's advice to consent does not per se immunize the consent. But since that position was never adopted by the Sixth Circuit, it makes no sense to grant the writ to correct it.

**C. This Court should not try to fashion a per se rule governing consent when an attorney's advice follows a threat.**

After urging this Court to hear the case because the Sixth Circuit has erroneously embraced a per se rule finding consent on an attorney's advice to be valid, petitioners argue that "an exception" must be declared that would prohibit weighing the lawyer's advice as a factor in favor of consent if it was preceded

by a threat. Careful analysis of petitioner's argument reveals that what they truly seek is a bright line rule that a "threat" to take one's children or to get in one way or another is sufficiently coercive that, if such a threat has been made, consent can never be given voluntarily, despite an attorney's advice.

Such a rule would be contrary to this Court's repeated endorsement of a totality of the circumstances test and its refusal to adopt a series of per se rules to govern the analysis of whether a consent is voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Petitioners argue that absent a per se rule providing an exception, consent will always be considered valid if an attorney advises the citizen to consent. But the Sixth Circuit has neither explicitly nor implicitly adopted such a rule. It is petitioners who seek a per se rule. In essence, what petitioners want the Court to do is to hold that a lawyer's advice to consent must be ignored if it comes after a threat.

Petitioners assert that if a police officer says "open or I'll shoot," the lawyer may urge his client to consent to avoid possible bloodshed. This should not, in petitioners' view, be deemed a voluntary consent. The hypothetical only underscores the fact-based nature of the inquiry and the importance of engaging in the kind of multi-factored analysis that this Court presently requires. The record in this case did not contain any hint of physical force. No weapons were drawn. No voices were raised. And the officer's statement that they would get in one way or another was understood by Mrs. Saltsman to mean that if they didn't get in, they would have to get a court order. The totality of the circumstances here gives a far different picture than petitioners' hypothetical in which physical force has been threatened and consent is given to avoid an altercation.

The discussion only highlights this Court's wisdom in refusing to decide consent by a series of per se rules. Such per

se rules will never be able to capture the myriad factual nuances in each unique encounter. And efforts to do so will fail to adequately analyze the endless variations in the facts and circumstances. No litmus paper test can be devised to distinguish when an attorney's advice is in response to a lawless but real threat of violence and when an attorney's advice represents a thoughtful and considered suggestion that cooperation with the government actor is in his or her client's best interest. Even in the discrete category of threats followed by an attorney's advice to consent, it is unlikely that this Court can reduce to a rule the question of whether a consent was voluntary. Rather, the rule should remain a broad fact-based analysis of the totality of the circumstances.

Petitioners claim that the Sixth Circuit's rule places police officers, citizens, and the rule of law in grave danger. Conjuring up a vision of physical confrontations between officers and citizens, petitioners characterize the attorney's advice as an effort to defuse a potentially dangerous situation. But this argument amounts to the setting up of a strawman. There is no suggestion in the record that any "deadly confrontation" was in the offing. Nothing in the record suggests that the Saltsmans were at physical risk. Petitioners argue that Gordon's advice was given in the tradition of the rule of law. They assert that the "lawyer's counsel to yield to an improper police threat so that the matter may be resolved later in a court must never be counted as a factor which cleanses the threat of its coercion" (Petition for a Writ of Certiorari, p. 16). They contend that lawyers should be encouraged "to defuse volatile situations" by deferring to illegal demands.

But the situation outside the Saltsmans' home was not volatile. There were no threats of force or physical violence. While Mrs. Saltsman was fearful of losing her children, she did not anticipate that the social worker and officers would

break down the door. One officer and the social worker had moved away from the house when she spoke with her lawyer.

If this Court has any interest in considering whether a threat of force should vitiate consent on advice of counsel, this is not the case to hear. More importantly, the totality of the circumstances test allows for consideration of precisely these kinds of facts. It does so in a multi-factored way that allows the courts to consider the type of threat, the question of whether it involved physical force or violence, and other factors in the particular circumstance that would bear upon the voluntariness of consent.

**D. The differing results reached in cases cited by petitioners are not based on a split in the circuits but differing results due to differing facts.**

Petitioners also urge this Court to grant a writ to resolve a split in the circuits concerning the determinative nature of a lawyer's advice to allow entry on the issue of the voluntariness of consent. Petitioners contend that *United States v. Molt*, 589 F.2d 1247 (3rd Cir. 1978) and *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974) conflict with the Sixth Circuit's decision in this case. But all of these cases hold that an attorney's advice is not determinative of the voluntariness of consent.

In *Molt*, the Third Circuit Court of Appeals upheld a district court ruling that Molt's consent was not voluntary based on the totality of the circumstances. 589 F.2d at 1251. The district court concluded that the customs agents innocently misrepresented their right to search Molt's premises, telling him that they could get a warrant if he refused when, in fact, the statute they relied on only required Molt to appear before the agents to give testimony. 589 F.2d at 1250. Although Molt's

attorney advised him to consent, this did not necessarily make consent valid because Molt's belief that he must consent was due to the government's misrepresentation, which was an important factor in deciding to consent. 589 F.2d at 1251.

The Third Circuit concluded that overturning the district court's decision "would be tantamount to holding that, as a matter of law, consent based on an attorney's advice must be voluntary." 589 F.2d at 1252. This, it declined to do. *Molt* is not therefore inconsistent with *Saltsman*. In both, the court applied the totality of circumstances. In both, the court explicitly refused to rule that consent based on an attorney's advice must always be voluntary. In each, the court weighed the unique and complex factors presented to conclude that the consent was valid.

Nor is *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974) in conflict with this case. In *Huotari*, the record showed a factual dispute. The officers concede that the plaintiff asked for a warrant but then testified that she invited them in. The plaintiff, on the other hand, testified that she did not wish to invite the officers in unless the law compelled her to do so. No attorney's advice was involved, although an attorney was on the phone with the plaintiff's son. The district court applied this Court's totality of circumstances and, given the inconsistencies and factual disputes in the record, ruled that the officers failed to show that consent was voluntary.

This does not conflict with *Saltsman*. Petitioners believe that the *Huotari's* officer's statement that the officers would conduct the search no matter what is analogous to the statements allegedly made in *Saltsman*. But the totality of circumstances in *Saltsman* showed that Tina Saltsman did not understand the statement to mean she was compelled by law to let the officers in. She knew that she could refuse. In contrast, the *Huotari*

court concluded that plaintiff may have thought she was compelled by law to consent to entry. As a result, the *Huotari* court reached a differing result.

These decisions do not reveal a split in the circuits. Rather, they demonstrate that federal courts have applied a fact-based analysis to the totality of circumstances in several cases which, on the differing facts, resulted in differing conclusions as to the voluntariness of the consent. These fact-based rulings do not require review or reflect a split in the circuits. Accordingly, a writ for certiorari should be refused.

## CONCLUSION

Based on the foregoing analyses and citations to authority, respondents respectfully request that this Court deny petitioners' request for a writ of certiorari and refuse to hear this case.

Respectfully submitted,

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